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March 23, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 10, 2006

Case Number: TSO-0445

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual's access authorization should not be restored at this time.

I. BACKGROUND

The individual is an employee of a Department of Energy (DOE) contractor, and has held a DOE access authorization for most of the period since July 1993. He held an access authorization continuously from November 21, 2002 until it was suspended in August 2006 in connection with the current proceeding. In July 2005, the individual submitted an Incident Report concerning an arrest for driving under the influence of alcohol (DUI) that occurred in late June 2005. In March 2006, the DOE conducted a Personnel Security Interview with the individual (the 2006 PSI). In addition, the individual was evaluated in June 2006 by a DOE-consultant psychiatrist (the DOE-consultant psychiatrist), who issued a report containing his conclusions and observations.

In August 2006, the Manager for Personnel Security of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. In this letter, the Manager states that the individual's behavior has raised security concerns under Section 710.8(j) of the regulations governing eligibility for access to classified material. Specifically, with respect to

Criterion (j), the Operations Office finds that the DOE-consultant psychiatrist diagnosed the individual as meeting the criteria for Substance Abuse, Alcohol, found in the *Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition (DSM-IV TR)*. The Notification Letter also refers to his June 2005 arrest for DUI with a breath alcohol content (BAC) of .13, and to the following two alcohol related-arrests involving the individual:

1. In August 1987, he was arrested and charged with Driving While Intoxicated (DWI) and his BAC registered .14 at the time of his arrest; and
2. In May 1986, he was arrested and charged with DWI and his BAC registered .172 at the time of his arrest.

Enclosure 2 to August 2006 Notification Letter.

The individual requested a hearing (hereinafter "the Hearing") to respond to the concerns raised in the Notification Letter. As his initial response to those concerns, the individual asserted that he disagreed with the DOE-consultant psychiatrist's finding that he had a current alcohol problem. He stated that following his June 2005 DUI, he completed a five-month substance abuse program offered in his community (the community program), and at the completion of this program, his substance abuse counselor "positively concluded that I do not have problems with alcohol." Individual's September 2006 Request for Hearing. He also stated that he has had no further problems with alcohol since his June 2005 DUI, and that his 1987 and 1986 DWI's occurred when he was still a teenager. *Id.*

In a November 2006 letter to me, the individual stated that he acted on the recommendations of the DOE-consultant psychiatrist and in September 2006, he re-enrolled in his community program and is attending Alcoholics Anonymous (AA) group sessions and discussion sessions on drug awareness and sobriety twice a week.

The requested hearing in this matter was convened in January 2007 (hereinafter the "Hearing"). At the Hearing, the individual did not contest the DOE-consultant psychiatrist's diagnosis of Alcohol Abuse. Accordingly, the testimony at the Hearing focused chiefly on the individual's efforts to mitigate the Alcohol Abuse concerns through abstinence from alcohol and recovery activities.

II. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R.

Part 710 upon the individual and the Hearing Officer. As discussed below, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the Hearing Officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6) and 710.27(b),(c) and (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *Personnel Security Review (Case No. VSA-0087)*, 26 DOE ¶ 83,001 (1996); *Personnel Security Hearing (Case No. VSO-0061)*, 25 DOE ¶ 82,791 (1996), *aff'd*, *Personnel Security Review (VSA-0061)*, 25 DOE ¶ 83,015 (1996). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence which could mitigate security concerns.

Nevertheless, the evidentiary burden for the individual is not an easy one to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, we

generally expect the individual in these cases to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the Hearing Officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995); *Personnel Security Hearing (Case No. VSO-0038)*, 25 DOE ¶ 82,769 (1995) (individual failed to meet his burden of coming forward with evidence to show that he was rehabilitated and reformed from alcohol dependence).

B. Basis for the Hearing Officer's Decision

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. HEARING TESTIMONY

At the Hearing, testimony was received from ten persons. The DOE presented the testimony of the DOE-consultant psychiatrist. 1/ The individual, who was not represented by counsel, testified and presented the testimony of his substance abuse counselor, his secondary substance abuse counselor, his AA sponsor, the leader of his men's support group, his girlfriend, his department manager,

1/ As indicated by the testimony of the DOE-consultant psychiatrist (TR at 11-13), he clearly qualifies as an expert witness in the area of addiction psychiatry.

his work coordinator, and his employer's human resources manager.
2/

A. The DOE-Consultant Psychiatrist

The DOE-consultant psychiatrist testified that in June 2006 he evaluated the individual. The DOE-consultant psychiatrist concluded that the individual met the *DSM-IV TR* criteria for Alcohol Abuse.

At the Hearing, the DOE-consultant psychiatrist testified that he was concerned about the individual's history of alcohol-related legal problems that were summarized in the Notification Letter. TR at 14-16. He stated that the individual's three DWI arrests indicated a greater problem with driving while intoxicated:

DWIs tend to be a tip-of-the-iceberg phenomenon, where if a person has one DWI arrest, there are estimates going anywhere from 100 to a couple thousand of episodes where the person probably was over the legal limit and was driving but just never got caught for a DWI arrest.

TR at 22.

He testified that the individual had been "generally pretty frank and straightforward" in their June 2006 interview and that the information he provided was "pretty much consistent" with information provided in previous DOE interviews. TR at 17. The DOE-consultant psychiatrist stated that the individual had acknowledged to the DOE a problem with drinking in moderation.

He realized, in looking at his own alcohol problem, that he had difficulty stopping at one drink or difficulty drinking in moderation, that within some period of time, he would go overboard and drink excessively. And the three DWIs were the obvious and main consequence of this problem.

2/ The individual's substance abuse counselor testified that he is a clinical psychologist and a licensed alcohol and drug abuse counselor with twelve years of experience. TR at 71. The individual's secondary substance abuse counselor also is a licensed substance abuse counselor. TR at 75. I find that they both qualify as expert witnesses in this area.

TR at 17. The DOE-consultant psychiatrist stated that he was concerned by the individual's decision to resume drinking in 1998 after having been sober for eleven years since his 1987 DWI and after having been warned by the DOE Security in 1993 that his past legal problems with alcohol were a concern. He stated that the individual's decision to resume drinking five years after his 1993 warning by the DOE "indicated a functional problem with respect to his employment." TR at 18.

Finally, the DOE-consultant psychiatrist testified that the individual reported to him that although he had completed a six month program that included AA meetings after his June 2005 DWI, he was no longer attending AA meetings on a regular basis, he did not have an AA sponsor, and he was occasionally consuming alcohol. TR at 19-20.

The DOE-consultant psychiatrist stated that all of this information led him to diagnose the individual as suffering from Alcohol Abuse, without adequate evidence of rehabilitation. TR at 24. With respect to the lack of rehabilitation, he stated that

The concerns I had were that he was continuing to drink, with his last drink two weeks before our interview. And then his AA program was kind of sparse at that time. His previous meeting was two months before my interview with him. So I said there wasn't yet adequate evidence.

TR at 24. He stated that the individual could demonstrate rehabilitation by remaining sober for a full year from his last drink, coupled with weekly attendance at AA meetings. TR at 27. He also recommended that the individual get a sponsor in AA. *Id.*

Following the testimony of the other witnesses, the DOE-consultant psychiatrist testified that since last consuming alcohol in early June 2006, the individual had committed himself to sobriety and has been participating in a good recovery program. TR at 141-143. 3/ He concluded that the individual will need to achieve a year of sobriety from his June 2006 sobriety date, along with continued participation in his recovery program, in order to demonstrate

3/ The individual reported to the DOE-consultant psychiatrist at their June 13 interview that he last consumed alcohol "two weekends ago." DOE-consultant psychiatrist's Report at 5. At the Hearing, the individual stated that he has not consumed alcohol since then. TR at 47. I therefore find that the individual's claimed sobriety date is June 4, 2006.

rehabilitation. TR at 145, 149. He stated that currently the individual is in early recovery, and his risk of relapse within the first year is still high at about forty percent. TR at 143-144.

B. The Individual's Substance Abuse Counselor

The individual's substance abuse counselor (the counselor) testified that he assessed the individual following his 2005 DUI when the individual participated in a court ordered program. He stated that he found that the individual had abused alcohol in the past and at the time of his 2005 DUI, but that the single recent incident involving alcohol did not support a current diagnosis of Alcohol Abuse. TR at 80. On the basis of this assessment, the individual was asked to complete the lowest level of treatment, "alcohol education level .5." This treatment included weekly education meetings, AA meetings, and a men's group meeting. TR at 78. The individual completed this treatment in December 2005 and received a certificate. TR at 72.

The counselor testified that after he completed this program, the individual continued to participate in the group meetings in the early part of 2006, and discontinued his attendance prior to June 2006. TR at 77-79. He affirmed that the individual then resumed his group meetings and consultations with him in September 2006 after he became aware that the DOE had concerns about his alcohol use. TR at 89-92. He agreed with the individual's assertion that the individual has consistently stated that he was abstinent from alcohol from the time of his June 2005 DUI until early June 2006, when he consumed a mixed drink at a social function, and that he has been abstinent since June 2006. TR at 92.

The counselor testified that the individual began to attend AA meetings in August 2005. He stated that the individual attended an AA meeting on Monday nights that followed his alcohol education meeting. TR at 94. He testified that, as with his alcohol education meetings, his attendance at AA meetings became sporadic in the Spring of 2006 and then resumed on a regular basis in September 2006. TR at 95-96.

The counselor stated that he would encourage the individual not to resume drinking. He testified that the individual is doing quite well in maintaining his sobriety. TR at 98. He stated that if the individual maintains his current level of AA meetings and group education meetings, his success rate for maintaining his abstinence "would likely be in the 90's." TR at 100.

After the DOE-consultant psychiatrist testified concerning his current assessment of the individual based on the Hearing testimony, the individual's counselor stated that he agreed with a lot of the DOE-consultant psychiatrist's testimony. TR at 149. He concurred that the individual's June 2006 relapse should "start the clock over again" with respect to his rehabilitation. TR at 150. He stated that he is convinced that the individual has gained considerable insight into his alcohol problem.

I've participated with [the individual] in a number of groups, and I'm convinced that he knows the dangers, and he has the insight that it is a problem.

TR at 151. He stated that he would advocate that the individual continue his AA participation and group meetings as the DOE-consultant psychiatrist recommended. TR at 152.

C. The Individual's Secondary Substance Abuse Counselor

The individual's secondary substance abuse counselor (the secondary counselor) testified that the individual resumed regular attendance at weekly alcohol education meetings in September 2006. TR at 106. She stated that he's been active and involved in the group, and honest about what he's been expressing. TR at 106. She stated that she believes that he has made good progress in his recovery and that she has no reason to doubt his reported sobriety since June 2006. TR at 107.

D. The Individual's AA Sponsor

The individual's AA sponsor testified that he has been attending AA meetings for over three years, that he currently attends a Monday night meeting with the individual, and that he occasionally leads that meeting. TR at 33-35. He stated that he agreed to be the individual's sponsor in December 2006. TR at 34. He stated that he planned to continue to attend weekly AA meetings with the individual for the next year, and also spend an extra hour a week with the individual studying the AA steps. TR at 46.

The individual's AA sponsor stated that the individual has been "really good" at maintaining his sobriety, and that he actively participates in discussions on AA topics. TR at 34. He stated that the individual has not spoken about using alcohol since he consumed a mixed drink in June 2006. TR at 49-51.

E. The Leader of the Individual's Men's Support Group

The leader of the individual's men's support group stated that the individual started attending the group in 2005. He testified that the individual was talkative and very friendly, and that he was always sober when he attended the weekly meetings. The group leader stated that in 2006 he was unable to facilitate the group and could not testify about the individual's attendance during that year. TR at 110.

F. The Individual

The individual testified that since his June 2005 DWI, he has only consumed alcohol on one occasion, when he consumed a mixed drink in early June 2006. TR at 48. He stated that he completed a five month court mandated treatment program that included weekly AA meetings and alcohol education classes led by his substance abuse counselor in December 2005. He stated that during the period from January through August 2006, he attended AA meetings sporadically and occasionally met with his counselor. TR at 125. In September 2006, he resumed meeting with this counselor twice a week, and attending AA meetings on a regular basis. TR at 123-125. He stated that he has known his AA sponsor since he began attending AA meetings in August 2005, but only asked him to be his formal AA sponsor in December 2006. TR at 126-127.

The individual testified that his current motto is that one drink is too many. TR at 135. He stated that he intended to continue with AA meetings and sessions with his counselor, and that he does not see himself consuming alcohol in the future.

I want to do right, I want to do justice, and I see a lot of kids look up to me, because I've coached literally, and they looked up to me. . . . [I] have a grandson, and I have to raise him up right. And if I do keep consuming alcohol, I don't think I will accomplish that. So right now, alcohol is not in the picture, and by [my counselor's] program, I'm going to stick to it, and I'll do whatever it takes to make it right.

TR at 136-137. The individual testified that he believed that it would be too risky for him to start drinking again. TR at 139.

G. The Individual's Girlfriend

The individual's girlfriend testified that she and the individual have been a couple for twenty plus years and have been living

together for ten years. She stated that they have two children and one grandchild. TR at 116-117. She stated that she has not seen him consume alcohol since his June 2005 DUI, and that she did not remember seeing him consume a mixed drink at a graduation function in early June 2006. TR at 118-119. She testified that they do not keep alcohol in their home. TR at 120. She stated that she believed that the individual was committed to his sobriety.

I think he's really making a big difference on his behalf, and he's really making an effort, and I know he doesn't consume alcohol.

TR at 120.

H. The Individual's Workplace Witnesses

The individual's department manager testified that he has never witnessed the individual consume alcohol at office social gatherings or at any other time, and that the individual has never had any issues with timeliness or attendance. TR at 68-69. The individual's work coordinator concurred with those statements, and testified that the individual's work performance is excellent. TR at 67.

The individual's human resources manager testified that the individual has always received outstanding annual evaluations, and that his current supervisor was pleased with his performance and had no issues with him. TR at 59.

IV. ANALYSIS

The individual believes that his seven months of sobriety since June 4, 2006, his participation in AA meetings, alcohol education meetings, and support group meetings, and his dedication to future abstinence from alcohol fully mitigate the Criterion (j) security concerns arising from his diagnosis of Alcohol Abuse and his arrests for DWI in 2005, 1987 and 1986. For the reasons stated below, I conclude that the individual's arguments and supporting evidence concerning his rehabilitation from Alcohol Abuse do not resolve the DOE's security concerns as of the date of the Hearing.

The testimony at the Hearing indicated that the individual has been abstinent from alcohol since June 4, 2006 and has attended AA meetings, alcohol education meetings, and support group meetings on a weekly basis since September 7, 2006. In addition, he consults with a substance abuse counselor and recently acquired an AA sponsor who intends to guide him in working the twelve step

program. In the administrative review process, it is the Hearing Officer who has the responsibility for forming an opinion as to whether an individual with alcohol problems has exhibited rehabilitation or reformation. See 10 C.F.R. § 710.27. The DOE does not have a set policy on what constitutes rehabilitation and reformation from alcohol diagnoses, but instead makes a case-by-case determination based on the available evidence. Hearing Officers properly give a great deal of deference to the expert opinions of psychiatrists and other mental health professionals regarding the likelihood of relapse. See, e.g., *Personnel Security Hearing (Case No. VSO-0027)*, 25 DOE ¶ 82,764 (1995) (finding of rehabilitation); *Personnel Security Hearing (Case No. VSO-0015)*, 25 DOE ¶ 82,760 (1995) (finding of no rehabilitation). At the Hearing, the DOE-consultant psychiatrist concluded that the individual was making good progress in his recovery from Alcohol Abuse but that he needed to continue his sobriety along with his current rehabilitation program for a full year until June 4, 2007, before he could demonstrate rehabilitation and reformation from his diagnosis of Alcohol Abuse and his alcohol-related legal problems. The individual's substance abuse counselor expressed agreement with the DOE-consultant psychiatrist's recommendations.

I agree with the conclusions of DOE-consultant psychiatrist and the individual's substance abuse counselor. My positive assessment of the individual's demeanor and of the evidence presented at the Hearing convince me that the individual has maintained his sobriety since June 4, 2006, that he has committed himself to sobriety, that he is actively participating in AA meetings, education meetings, and support group meetings, and that he has shared his commitment to sobriety with his girlfriend and with his local community. These positive developments are all significant factors which indicate progress towards rehabilitation and reformation from Alcohol Abuse. However, I agree with the DOE-consultant psychiatrist that the individual must maintain his sobriety, along with his rehabilitation program, until June 4, 2006, before he can be considered reformed and rehabilitated from Alcohol Abuse. The DOE-consultant psychiatrist believes that a full year of abstinence from alcohol, demonstrating that the individual can handle the challenges to abstinence posed by holidays, vacations and other circumstances, is necessary for the individual to demonstrate that he is at low risk for relapsing into Alcohol Abuse. I find the concerns raised by the DOE-consultant psychiatrist to be reasonable and persuasive, and I find that rehabilitation or reformation has not yet occurred. Accordingly, I conclude that it would not be appropriate to restore the individual's access authorization at this time.

V. CONCLUSION

For the reasons set forth above, I find that the individual suffers from Alcohol Abuse subject to Criterion (j). Further, I find that this derogatory information under Criterion (j) has not been mitigated by sufficient evidence of rehabilitation and reformation at this time. Accordingly, after considering all of the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. It therefore is my conclusion that the individual's access authorization should not be restored. The individual or the DOE may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: March 23, 2007